Supreme Court, U.S.
FILED
OCT 9 1992
OFFICE OF THE CLERK

(2)

NO. 92-522

In the

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH GARDNER, LOVANA JONES, DAN BARREIRO, WILLIAM SHEPARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., AND BOBBY E. THOMPSON,

Appellants,

v.

GEORGE H. RYAN sued in his official capacity as ILLINOIS SECRETARY OF STATE, ILLINOIS STATE BOARD OF ELECTIONS, ALBERT JOURDAN, FRANK WATSON, ROBERT CHURCHILL, DALLAS INGEMUNSON, and GENE HOFFMAN,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS OR AFFIRM

DAN K. WEBB
STEVEN F. MOLO *
TIMOTHY J. ROONEY
THOMAS V. SKINNER
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Attorneys for Appellees

* Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the United States District Court for the Northern District of Illinois properly approved the Illinois state legislative redistricting plan over challenges to the plan based on federal law.

TABLE OF CONTENTS

Page

MOTION TO DISMISS OR AFFIRM 1

OVERVIEW OF THE MOTION 2

ARGUMENT 4

I. THE THREE-JUDGE PANEL PROPERLY DENIED THE APPELLANTS' CHALLENGES UNDER THE VOTING RIGHTS ACT IN UPHOLDING THE JOURDAN III-A PLAN 4

A. The Three-Judge Panel Correctly Found No Violation Of The Voting Rights Act On The Challenged Cook County African-American Super-Majority Districts 7

1. Appellants Failed To Prove Political Cohesiveness Among African-Americans In The Challenged Districts. 8

2. Appellants Failed To Prove Majority Opposition Bloc Voting In The Challenged Districts. 8

3. Appellants Failed To Prove Vote Dilution In That The Challenged Districts Are All Super-Majority Minority Districts In Which African-Americans Could Elect Candidates Of Their Choice. 10

Page

B. The Three-Judge Panel Properly Found That Appellants Failed To Establish A Voting Rights Act Violation For Downstate Minority "Fracturing" 15

1. "Influence" District Is Not A Recognized Concept Under The Voting Rights Act. 16

2. Appellants Cannot Satisfy The *Gingles* Threshold Elements As To The Downstate Minority Fracturing Claims. 19

3. The Evidence Failed to Prove Appellants' Theory Of "Influence" In The Downstate Districts. 21

C. The Three-Judge Panel Correctly Found No Violation Of The Voting Rights Act On The Hispanic "Influence" District On Chicago's Northwest Side 23

1. The Three-Judge Panel Correctly Found That Appellants Failed To Establish That Hispanics In House District 33 Could Elect Candidates Of Their Choice. 24

2. The Three-Judge Panel Properly Rejected Appellants' Claimed Voting Rights Act Violation For An "Influence" District. 25

(a) Appellants Have Failed to Satisfy the *Gingles* Threshold Elements 26

Page

(b) The Appellants' Gardner Plan House District 33 Impairs Hispanic Voting Power 27

II. THREE-JUDGE PANEL PROPERLY DENIED THE APPELLANTS' CHALLENGES UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS IN UPHOLDING THE JOURDAN III-A PLAN 28

III. THE THREE-JUDGE PANEL PROPERLY FOUND THAT THE RESULTS OF THE MARCH 1992 PRIMARY ELECTION DID NOT PROVIDE AN ADEQUATE BASIS FOR A NEW TRIAL 30

CONCLUSION 33

TABLE OF AUTHORITIES

Cases **Page**

Armour v. Ohio, 775 F. Supp. 1044 (N.D. Ohio 1991) 16

Chisom v. Roemer, ___ U.S. ___, 111 S. Ct. 2354 (1991) 16, 17, 18, 19

City of Mobile v. Bolden, 446 U.S. 55 (1980) 28, 29, 31

Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs, 906 F.2d 524 (11th Cir. 1990) 5

Davis v. Bandemer, 478 U.S. 109 (1986) 9, 28, 29, 30

DeBaca v. County of San Diego, 794 F. Supp. 990 (S. D. Cal. 1992) 16

Gaffney v. Cummings, 412 U.S. 735 (1973) 29

Gardner, et al. v. Ryan, No. 91-1655 (August 18, 1992) 2

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 28

Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) 5, 11, 12, 16, 17

Illinois Legislative Redistricting Comm'n v. LaPaille ,786 F. Supp. 704 (N.D. Ill. 1992) 2, 3, 5, 6, 13, 15, 16, 21, 25, 26, 27, 29

Illinois Legislative Redistricting Comm'n v. La-Paille, 792 F. Supp. 1110 (N.D. Ill. 1992) 2, 3, 30

Jenkins v. Red Clay Consolidated School Dist. Bd. of Educ., 780 F. Supp. 221 (D. Del. 1991) 10, 31

Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985) 12, 28

Latino Political Action Comm. Inc. v. City of Boston, 784 F.2d 409 (1st Cir. 1986) 11

Cases **Page**

McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 409 U.S. 1031 (1989) 5, 16, 17, 25

Reynolds v. Sims, 377 U.S. 533 (1964) 28

Rogers v. Lodge, 458 U.S. 613 (1982) 29

Rybicki v. State Bd. of Elections, 574 F. Supp. 1147 (N.D. Ill. 1983) 11, 12

Skorepa v. City of Chula Vista, 723 F. Supp. 1384 (S.D. Cal. 1989) 16, 17

Thornburg v. Gingles, 478 U.S. 30 (1986) 5, 7, 9

Turner v. State of Ark., 784 F. Supp. 553 (E.D. Ark. 1991) 17, 26

United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) 11

Westwego Citizens for Better Gov't v. City of Westwego, 946 F.2d 1109 (5th Cir. 1991) 5

Whitcomb v. Chavis, 403 U.S. 124 (1971) 18, 28

White v. Register, 412 U.S. 755 (1973) 18

Williams v. State Bd. of Elections, 748 F. Supp. 1324 (N.D. Ill. 1989) 9

Williams v. City of Dallas, 734 F. Supp. 1317 (N.D. Tex. 1990) 5

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom, East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam) 5

Other Authorities

48 U.S.C. § 1973 *et seq* 31

NO. 92-522

In the
Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH GARDNER, et al.,

Appellants,

v.

ILLINOIS LEGISLATIVE
REDISTRICTING COMMISSION, et al.,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS OR AFFIRM

Appellees Illinois Legislative Redistricting Commission ("Commission"), Illinois State Board of Elections, Al Jourdan, Frank Watson, Robert Churchill, Gene Hoffman, Dallas Ingemunson, and George Ryan in his official capacity as Illinois Secretary of State, (collectively, "Appellees"),[1] hereby move this Court, pursuant to Supreme Court Rule 18.6, to dismiss this appeal or to affirm the decision of the three-judge panel of the United States District Court for the Northern District of Illinois.

---

1 The Illinois State Board of Elections, listed as one of the Appellees of this proceeding, is not a party to this brief. However, the Board of Elections has acted as a nominal party, and did not engage in any substantive argument at any time, during the proceedings below.

OVERVIEW OF THE MOTION

Appellants seek to have this Court review two decisions of the three-judge panel in the district court rejecting Appellants' federal law challenges to a plan of redistricting for the Illinois General Assembly: a March 11, 1992 opinion issued after a five-day trial of this case, Illinois Legislative Redistricting Commission v. LaPaille, 786 F. Supp. 704 (N.D. Ill. 1992) ("*March 11 Opinion*"); and a June 11, 1992 order denying Appellants' motion for a new trial, *Illinois Legislative Redistricting Commission v. LaPaille*, 792 F. Supp. 1110 (N.D. Ill. 1992) ("*June 11 Opinion*"). The *March 11 Opinion* and *June 11 Opinion* upheld the final reapportionment plan approved by the Commission ("Jourdan III-A") against Appellants' challenges under the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the United States Constitution.

The Jourdan III-A plan of redistricting was the result of numerous hearings and debates in the Illinois General Assembly, additional hearings, debates, and public comment before the Commission (a special bipartisan redistricting body convened pursuant to the Illinois Constitution), and extensive briefing and argument before the Illinois Supreme Court. The Illinois Supreme Court rejected Appellants' challenges to the Jourdan III-A plan, ultimately finding that the plan complied with the state constitutional requirements for compactness, contiguity, and equality of population. The Illinois Supreme Court found specifically that the plan did not dilute the votes of minorities in violation of the free and equal elections clause of the Illinois Constitution. This Court denied Appellants' Petition for Writ of Certiorari to the Illinois Supreme Court. *Gardner, et al. v. Ryan*, No. 91-1655 (August 18, 1992).

Appellants' federal law challenges to Jourdan III-A were tried before a three-judge panel during February 1992. Initially, the Commission moved to dismiss the Appellants' claims but the court denied the motion in part and ordered a trial. The panel heard expert testimony and examined voluminous documentary evidence submitted by various parties (including Appellants) challenging Jourdan III-A, as well as Appellees' evidence. Also before the trial court was Appellants' own proposed plan of reapportionment (the "Gardner Plan"). In addition, the panel had before it the entire record of the

proceedings before the Commission and in the Illinois Supreme Court. The three-judge panel carefully considered this voluminous evidence and, in the *March 11 Opinion*, correctly determined that Jourdan III-A satisfied the Voting Rights Act and the United States Constitution. *See March 11 Opinion*, 786 F. Supp. at 717-18. The panel also correctly determined, in the *June 11 Opinion*, that a new trial was not necessary in light of Appellants' claims about the results of primary elections held after the three-judge panel's *March 11 Opinion* approving Jourdan III-A. *See June 11 Opinion*, 792 F. Supp. at 1113.

In this Court, Appellants seek review of the three-judge panel's March 11 and June 11 Opinions. In their Jurisdictional Statement filed September 9, 1992, Appellants claim four alleged infirmities in the two opinions:

(1) They contend the three-judge panel failed to consider the "totality of the circumstances" in rejecting Appellants' challenges to certain super-majority and "influence" districts in Jourdan III-A (Juris. Stmt. at 27-33);

(2) They contend the three-judge panel failed to recognize and apply the concept of "influence" districts to certain "downstate" areas (Juris. Stmt. at 35-37);

(3) They contend the three-judge panel failed to recognize and apply the concept of "influence" districts to a so-called Hispanic "influence" district on the northwest side of Chicago (Juris. Stmt. at 27, 33-35); and

(4) They contend the three-judge panel failed to explain how Appellants did not satisfy their burden of proof for the constitutional challenge to Jourdan III-A (Juris. Stmt. at 37-38).

None of these arguments justify this Court's review of the three-judge panel's March 11 and June 11 Opinions. Appellees therefore move to dismiss this appeal or in the alternative to affirm the rulings of the panel below.

ARGUMENT

I. THE THREE-JUDGE PANEL PROPERLY DENIED THE APPELLANTS' CHALLENGES UNDER THE VOTING RIGHTS ACT IN UPHOLDING THE JOURDAN III-A PLAN

The Jourdan III-A plan was designed to maximize the voting influence of minority groups throughout the State of Illinois. It created eighteen House and eight Senate African-American super-majority districts (with total African-American population over 65% and voting age population near or above 60%) and four House and two Senate Hispanic super-majority districts. By contrast, the Appellants' plan, developed and advocated by interests of the Democratic Party, contained only seventeen House and eight Senate African-American super-majority districts and four House and two Senate Hispanic super-majority districts.

Despite Jourdan III-A's clear superiority in its responsiveness to minority voting interests, Appellants challenged Jourdan III-A under the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, and the Fourteenth and Fifteenth Amendments as follows: (i) that Jourdan III-A created certain African-American super-majority districts in and around Chicago which denied African-Americans the opportunity to elect candidates of their choice; (ii) that Jourdan III-A "fractured" minority voting strength in certain downstate areas; and (iii) that Jourdan III-A "fractured" Hispanic voting strength by failing to create an Hispanic "influence" district on the northwest side of Chicago. The fracturing claims, in essence, alleged that districts were constitutionally infirm because they failed to group together all of the minorities in a two- or three-district area even though the minority population in the district into which they would be consolidated still fell far short of a majority — in some instances, the consolidated minority population was as low as 5.0%. The "influence" district claim, in essence, alleged that the Jourdan III-A districts were illegal because they did not group minorities in a manner which maximized the ability of the minority group to "influence" or "swing" an election. In all three arguments, Appellants contended that Jourdan III-A diluted minority voting strength.

After a five-day trial, the three-judge panel took the matter under advisement for 31 days and then issued an order rejecting Appellants' claims. *March 11 Opinion*, 786 F. Supp. at 717. Despite Appellants' generalizations, both the *March 11* and *June 11 Opinions* reflect a careful consideration of the facts and law.

To establish a vote dilution claim under section 2 of the Voting Rights Act, a plaintiff must show three threshold elements: (1) the minority group is sufficiently large and compact to constitute a majority of the population in the district; (2) the minority group is politically cohesive; and (3) the non-minority group usually votes sufficiently as a block to defeat the minority group's preferred candidates. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 649 (N.D. Ill. 1991). Appellants failed to establish these factors at trial.

Lower courts applying *Gingles* have consistently held that these threshold elements must be satisfied *before* a court looks at the "totality of the circumstances," or the so-called *Zimmer* factors.[2] *See McNeil v. Springfield Park Dist.*, 851 F.2d 937, 943 (7th Cir. 1988) ("We therefore must reject appellants' contention that a court, in considering section 2 claims, must explore the totality of the circumstances without first determining whether the *Gingles* threshold criteria are met."), *cert. denied*, 490 U.S. 1031 (1989); *see also Westwego Citizens for Better Gov't v. City of Westwego (Westwego III)*, 946 F.2d 1109, 1116 (5th Cir. 1991); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 527 (11th Cir. 1990); *Hastert*, 777 F. Supp. at 648; *Williams v. City of Dallas*, 734 F. Supp 1317, 1319, 1401 (N.D. Tex. 1990). The three-judge panel reached this same conclusion. *See March 11 Opinion*, 786 F. Supp. at 711.

Appellants claim that *Gingles* required the three-judge panel to undertake a detailed "totality of the circumstances" analysis in its opinion even though they failed to establish the first three factors

---

2 *Zimmer v. McKeithen*, 485 F.2d 1297, 1305-07 (5th Cir. 1973) (en banc), *aff'd sub nom, East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam).

under *Gingles* Juris. Stmt. at 28-29.[3] Appellants' claim that the three-judge panel did not consider the proffered "totality of the circumstances" evidence, Juris. Stmt. at 28-29, is belied by the record. The three-judge panel noted the affidavits of community leaders which were introduced into evidence by Appellants, *March 11 Opinion*, 786 F. Supp. at 713 n.8, and the three-judge panel specifically found no Voting Rights Act violations in the African-American super-majority districts "based on the 'totality of the circumstances.'" *Id.* at 713.[4] Second, Appellants have completely misread this Court's discussion of "totality of the circumstances" in *Gingles*. The citation to *Gingles* proffered by Appellants, 478 U.S. at 43, *see* Juris. Stmt. at 26, is to the *Gingles* Court's discussion of language of the Voting Rights Act and its legislative history. The *Gingles* court went on to set out the three threshold elements and to clearly place the "totality of the circumstances" factors in a *subordinate role* to showing that

---

3 Appellants offered "totality of the circumstances" evidence in the form of affidavits from various individuals in certain communities.

4 As with the "totality of the circumstances" analysis, assertions that "the extent of the District Court's analysis of the evidence proffered regarding super-majority districts" was the court's conclusion that Appellees experts' opinion "was better reasoned and better supported by the record," Juris. Stmt. at 29, is also a gross mischaracterization of the record. The *March 11 Opinion* makes clear that the three-judge panel took into consideration population information, *see March 11 Opinion*, 786 F. Supp. at 711-12, 715, results from previous elections, *id.* at 713, prior use of the 65% population standard, *id.* at 712-14, and even the affidavits of community leaders which the Appellants introduced into evidence, *id.* at 713 n.8. Indeed, after considering this evidence, the three-judge panel concluded: "Based on the 'totality of the circumstances,' the Gardner parties [*i.e.*, Appellants] have failed to show that the super-majority districts violate the Voting Rights Act in any respect. The super-majority districts provide African-Americans with a meaningful opportunity to elect candidates of their choice." *March 11 Opinion*, 786 F. Supp. at 713. Precisely because the Appellants failed at trial to establish the *Gingles* threshold elements, the three-judge panel had no need to consider Appellants' "totality of the circumstances" evidence.

the complained-of districting method deprives the minority group of its ability to elect a candidate of choice:

> . . . if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure [(the electoral districting at issue in *Gingles*)] interferes with their ability to elect their preferred candidates. *Minority voters may be able to prove that they still suffer social and economic effects of past discrimination*, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, *but they have not demonstrated a substantial inability to elect* caused by the use of a multimember district. *By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they are entitled to relief.*

478 U.S. at 49 n.15 (emphasis supplied). Thus, Appellants' claim that review by this Court is warranted based on Appellants' "totality of the circumstances" evidence, *see* Juris. Stmt. at 28, 30-31, is legally incorrect if Appellants failed to prove the three threshold elements under *Gingles*. As the three-judge panel correctly found, Appellants failed to meet their burden of proof.

A. The Three-Judge Panel Correctly Found No Violation Of The Voting Rights Act On The Challenged Cook County African-American Super-Majority Districts

At trial, Appellants isolated eight House and three Senate African-American super-majority districts in the approved Jourdan III-A plan which they alleged deny African-Americans in those districts a fair opportunity to elect a candidate of their choice.[5] The evidence presented at trial conclusively established that the Appellants have not shown a Voting Rights Act violation in these districts,

---

5 The districts challenged were: House 5, 6, 21, 23, 24, 26, 27, and 28 and Senate 3, 12, and 14.

and the three-judge panel's decision is justified for two reasons: (1) Appellants failed to establish the Gingles threshold elements of a section 2 claim; and (2) the over-65% populations in each of the challenged districts is empirically adequate to give African-Americans in those districts the ability to elect candidates of their choice.

1. Appellants Failed To Prove Political Cohesiveness Among African-Americans In The Challenged Districts.

The second *Gingles* threshold element requires that the minority group be politically cohesive. In an attempt to justify their own Gardner Plan's district structure, Appellants claimed in their pleadings, before the three-judge panel, and even before this Court, that the African-Americans in the identified districts are not "politically cohesive":

> In the City of Chicago, where African-Americans experience differing economic circumstances, differing political agendas in local issues, differing local political organizations and, at the local level, differing political communities of interest, it is inappropriate to disregard those differences, engage in the incorrect assumption that all African-Americans and their communities are alike and force rival political organizations to compete for the African-American vote in primary elections . . .

Juris. Stmt. at 31-32. See Gardner C-Claim ¶ 32. These admissions of a lack of political cohesiveness mean that the second Gingles threshold element is clearly absent.

2. Appellants Failed To Prove Majority Opposition Bloc Voting In The Challenged Districts.

The third *Gingles* threshold element requires that whites in fact vote to block the preferred candidates of African-Americans. The Appellants completely failed to offer proof which satisfied this threshold element. After analyzing the eleven elections held over the past five years in which African-American candidates ran against white

candidates, Appellants' expert, Kimball Brace, admitted that African-American candidates in House District 26 carried the district in **all eleven** elections, that in seven of the challenged districts (House Districts 5, 6, 21, 27, 28 and Senate 12 and 14) African-Americans were able to have the African-American candidates carry the district in **nine** of the eleven races, while in the remaining three districts (House Districts 23, 24 and Senate District 3) the African-American candidates carried the district in **eight** of the eleven races. In each of these identified instances where the African-American candidates carried the district, Mr. Brace admitted that the African-American communities in the various districts were able to elect the candidates of their choice. Mr. Brace also admitted that there was no evidence of effective white bloc opposition voting in the 1987 City Treasurer Democratic Primary Election, 1987 City Treasurer General Election, 1987 Mayoral Primary Election, 1987 Mayoral General Election, 1989 Mayoral Democratic Primary Election, 1989 Mayoral General Election, 1990 Cook County State's Attorney Election, and the 1990 Attorney General Election. (Northern District of Illinois, three-judge panel, February 1992 Trial Transcript ("Tr.") at 253, 256, 258, 259, 262, 263).

Federal law requires evidence of a *"consistent"* degradation of voting power and proof of *"continued"* frustration of the will of the majority of voters, *Davis v. Bandemer*, 478 U.S. 109, 135 (1986) (separate opinion of White, J.) (emphasis supplied), and showing that the white voting bloc must *"usually* be able to defeat candidates supported by a politically cohesive, geographically compact minority group . . . ." *Gingles*, 478 U.S. at 48. "Usually" has been defined to mean "more often than not." *Williams v. State Bd. of Elections*, 718 F. Supp. 1324, 1328 (N.D. Ill. 1989). Therefore, a *history* or *pattern* of white bloc voting is necessary under the Voting Rights Act. Here, Appellants did not establish a history of white bloc voting; indeed, far "more often than not" the African-American candidates win in the challenged districts, and thus the *history* or *pattern* in these districts — i.e., what "usually" happens — is a *lack* of white bloc voting. Mr. Brace's attempt to point to one election where he claimed that African-Americans did not elect the candidate of their choice cannot satisfy the *Gingles* standard because "[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory." *Bandemer*,

478 U.S. at 135 (separate opinion of White, J.); *see also Jenkins v. Red Clay Consolidated School Dist. Bd. of Educ.*, 780 F. Supp. 221, 231 (D. Del. 1991) ("Results from one election do not show that white voters usually vote in a way to defeat the black voters' choice of candidate.'") In short, Appellants' evidence failed to satisfy — and in fact proved the opposite of — the third *Gingles* element. Thus, Appellants' challenges to the eight House and three Senate African-American super-majority districts in Chicago failed to establish the threshold elements of a claim under the Voting Rights Act.

3. Appellants Failed To Prove Vote Dilution In That The Challenged Districts Are All Super-Majority Minority Districts In Which African-Americans Could Elect Candidates Of Their Choice.

The evidence at trial proved that in of each of the challenged African-American super-majority districts, the African-American community would be able to elect candidates of their choice. Appellants have admitted that each of the challenged Chicago districts is an African-American super-majority district with African-American population exceeding 65%. The challenged districts have the following populations:

District		African-American Pop.	%	African-American VAP	%
Senate	3	126,486	65.3	81,216	59.9
	12	129,481	66.8	83,813	63.7
	14	126,389	65.2	92,231	64.4
House	5	63,399	65.4	41,892	62.7
	6	63,087	65.1	39,324	57.2
	21	63,812	65.9	46,060	64.3
	23	63,233	65.3	42,293	62.6
	24	66,248	68.4	41,510	64.8
	26	70,507	72.8	48,509	72.4
	27	63,032	65.1	47,065	65.0
	28	63,357	65.4	45,166	63.9

Minority concentrations of 65% total population in a district provide the group with a reasonable opportunity to "exercise political control over that district." *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977); *Latino Political Action Comm. Inc. v. City of Boston*, 784 F.2d 409, 414 (1st Cir. 1986); *Hastert*, 777 F. Supp. at 647. The 65% figure is widely accepted in the field of redistricting as sufficient because a minority has sufficient voting strength to elect its candidate of choice and is a guideline used by the Department of Justice, reapportionment experts (including Appellants' expert Kimball Brace, *see Rybicki v. State Bd. of Elections*, 574 F. Supp. 1147, 1149 n.4 (N.D. Ill. 1983)), and the court considering the challenge to the United States congressional district reapportionment in *Hastert*, 777 F. Supp. at 647.

Appellants now complain of a "mechanical application of a bright-line test" based on this 65% rule. Juris. Stmt. at 31. They contend it does not account for low voter turnout or registration. Juris. Stmt. at 29-30. However, the 65% super-majority figure recognizes that minorities may have difficulty electing the candidate of their choice with a simple majority because of low voter turnout, low voting

age population, and low voter registration. To counteract these potential obstacles to voting power, the 65% number starts with 50% population to constitute a majority and then adds 5% additional population to counter the presumed affects of a young population, 5% additional population to counter the presumed affects of low voter registration, and 5% additional population to counter the presumed affects of low voter turnout. *See Ketchum v. Byrne*, 740 F.2d 1398, 1415 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). Thus, the 65% figure factors in the problems inherent in minority participation in the political process and protects the political power which might not be protected adequately with a simple majority. *Hastert*, 777 F. Supp. at 647; *Rybicki*, 574 F. Supp. at 1113 n.87. While the 65% figure is not etched in stone, no court has ever required a district to be configured to contain more than 65% minority population. Indeed, less than 65% may be sufficient to allow minorities to elect their candidate of choice. Yet, Appellants here seek a "double-counting"; they demand more population in the districts because of low voter registration and turnout when such factors are already built into the 65% total population figure applied in the challenged districts.

Significantly, a 65% African-American population in the areas comprising the very districts challenged by Appellants repeatedly has been held to be sufficient to allow African-Americans to elect the candidate of their choice. In *Hastert*, *Ketchum*, and *Rybicki*, the courts approved of the 65% figure when applied to these *same Chicago-area African-American voters* in the context of congressional redistricting, ward remapping for the city of Chicago, and the 1981 state legislative redistricting.

Perhaps the most significant evidence for the sufficiency of the over-65% total population in each of the challenged African-American super-majority districts came from Appellants' own expert, Kimball Brace. Mr. Brace admitted that the 65% total population standard is a rule of thumb used by courts in determining whether a minority group can elect candidates of their choice which may be raised or lowered depending on local circumstances. (Tr. 217-19, 221). Mr. Brace admitted that the 65% rule is based on the rough equation of 50% for a majority, plus upward adjustments of 5% for lower voting

age population, 5% for lower voter registration, and 5% for lower voter turnout. (Tr. at 217-19, 225-28).

On cross-examination, Mr. Brace admitted that the empirical data in this case shows that giving upward adjustments in population of 5% for lower voter registration, 5% for lower voting age population, and 5% for lower voter turnout gives *more* protection to African-Americans in the challenged districts than the empirical data suggests is required for each of these adjustment factors. *See* (Tr. 226-28, 284-87); *March 11 Opinion*, 786 F. Supp. at 712 n.7. Application of the 65% rule is therefore appropriate in Chicago and may even overstate the population totals needed to provide African-Americans the opportunity to elect candidates of their choice. Because each of the challenged districts has a total African-American population *in excess* of 65%, empirical data supports the finding that African-Americans will be able to elect candidates of their choice in each of the challenged districts.

Appellees' expert, Dr. Richard Engstrom, also provided expert testimony proving the ability of African-Americans in the challenged districts to elect candidates of their choice. After analyzing the electoral history in Illinois, Dr. Engstrom found that a super-majority district following the 65% rule provided African-Americans in Illinois the opportunity to elect a candidate of their choice (Tr. at 518-19), and that the districts challenged by the Appellants provide African-American voters a fair opportunity to elect a candidate of their choice (Tr. at 520, 536). Dr. Engstrom's opinion was based on the most recent eleven city, county, or statewide elections in which voters in these districts had a choice between or among African-American(s) and other candidates within the past five years. (Tr. at 520-21).

The results from these eleven elections show that the vote totals for the African-American candidate(s) in the challenged districts exceed the vote totals cast for other candidates in all but two elections. (Tr. at 521-31). In House District 26, the African-American candidate(s) won in *all eleven* of the elections. (Tr. at 528). The two aberrant elections, the 1991 Mayoral Democratic primary and general elections, were re-election races involving a particularly popular incumbent — Richard M. Daley. Dr. Engstrom determined that these races, on their own, do not erase the trend established by all of the

other elections over the past five years. (Tr. at 531). Rather, the results in the City Clerk's race in 1991, which involved very low voter turnout primarily as a result of the mayoral matchup, and also involved a white Democratic-slated candidate, showed that even with those impediments, African-American votes out-totaled white votes in all but two of the challenged House districts and one challenged Senate district. Significantly, even in those two House districts and one Senate district, the margin of victory was only several hundred votes. Thus, even in an aberrant election year, with voter turnout skewed by a particularly unique mayoral contest involving a very popular white incumbent mayor, African-American voters retained a *fair opportunity* to elect candidates of their choice in the challenged districts.

Thus, the evidence established that the African-American super-majorities in the challenged districts can elect candidates of their choice. This is clear not only from the 65% minority population existing in the districts, but from a historical analysis of the results of elections involving white candidates pitted against African-American candidates in the geographic area encompassed within the challenged districts.[6] As the three-judge panel concluded:

---

6 Appellants complain that the three-judge panel did not analyze data they submitted at trial and that the three-judge panel's finding that Dr. Engstrom's testimony was better supported and better reasoned than Mr. Brace's was somehow insufficient. (Juris. Stmt. at 29). However, this case was a battle of expert opinion as to the *significance* of the raw data submitted to the Court, and the three-judge panel was well-informed about Mr. Brace's lack of credibility. In the 1981 *Rybicki* litigation, Mr. Brace — testifying in favor of the Democratic Commission Plan — opined that a redistricting plan which provided for only twelve African-American House districts and five African-American Senate districts was "racially fair" (Tr. at 294), while in this case, despite a *decline* in African-American population in the city of Chicago of approximately 109,000 since 1981 (Tr. at 293) — Mr. Brace criticized as "not fair" a plan which contains seventeen House districts and eight Senate African-American districts. In *Ketchum*, Mr. Brace supported a Democratic ward plan which divided a population of 50,000 Hispanics into two separate wards, testifying under oath that an 83% Hispanic population was not enough to create an effective district, and that splitting 83% population therefore was

> [Appellants] bore the burden of showing that the challenged districts did not comply with the Voting Rights Act. That burden was particularly heavy in view of the 65% or greater African-American majorities in each of the eight House and three Senate districts at issue. Increasing the African-American majorities in those districts would run the risk of diluting African-American voting strength through "packing," and thereby constitute a § 2 Voting Rights violation. . . . Based on the "totality of the circumstances," the [Appellants] have failed to show that the super-majority districts violate the Voting Rights Act in any respect.

March 11 Opinion, 786 F. Supp. at 713. The evidence supports the three-judge panel's conclusion that Appellants' claims concerning these African-American super-majority districts were without legal merit and were not supported by the evidence.

B. The Three-Judge Panel Properly Found That Appellants Failed To Establish A Voting Rights Act Violation For Downstate Minority "Fracturing"

Appellants presented evidence on several "downstate" cities or communities outside of Chicago — Aurora, Champaign, Leyden Township, Rock Island, Springfield, and Waukegan — in which they claim that African-American and/or Hispanic populations were not sufficiently combined into single districts so as to maximize their ability to "influence" elections.[7] The three-judge panel rejected

---

not "fracturing" (Tr. at 321), while in this case, Mr. Brace opined that "splitting" only *843* African-American voters in Champaign and only *294* African-American voters in Springfield (in districts of 89,000 people) does constitute "improper fracturing." Finally, Mr. Brace admitted that the effect of the reconfigured downstate districts in the Gardner Plan he supported would be a net gain of "four or five" House seats for the Democratics. (Tr. at 393).

7 The Appellants abandoned their claims on Bloomington-Normal, Decatur, Elgin, Joliet, and Metro-East (East St. Louis) at trial.

these claims. *March 11 Opinion*, 786 F. Supp. at 716-17. The three-judge panel's conclusion is justified for several reasons.

1. "Influence" District Is Not A Recognized Concept Under The Voting Rights Act.

The argument for the existence of "influence" districts is little more than an attempt to ignore the express requirement of a majority in the first *Gingles* element. This Court has never required that a district be created with a minority voting age population of less than 50% for the purpose of maximizing that group's influence in an election. Appellants' claim for such a district is ultimately premised on a supposed recognition of "influence" districts in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) and dicta of this Court in *Chisom v. Roemer*, ___ U.S. ___, 111 S. Ct. 2354 (1991). Neither case supports Appellants' argument. First, the *Armour* court did *not* recognize the concept of an "influence" district as advanced by Appellants. In a footnote, the *Armour* court specifically noted:

> The plaintiffs . . . suggest that §2 of the Voting Rights Act may permit an action based on a minority group's "ability to influence" an election in an single-member district which is independent of that group's ability to elect a candidate of its choice. . . . *We need not reach the question of whether such an action may be viable under the Voting Rights Act* because we find that the plaintiffs have met their burden of demonstrating an ability to elect a candidate of their choice.

Armour, 775 F. Supp. at 1059 n.19 (emphasis supplied). Thus, *Armour* cannot be viewed as somehow endorsing the concept of an "influence" district. The minority "influence" district concept supposedly embraced in *Armour* has been rejected by other courts. *See DeBaca v. County of San Diego*, 794 F. Supp. 990, ___ (S. D. Cal. 1992); *Hastert*, 777 F. Supp. at 655. Several pre-*Armour* cases likewise expressly rejected attempts to invoke a section 2 claim with less than a majority. *See McNeil*, 851 F.2d at 947 (minority group constituting 50.2% of total population but only 43% of voting age population did not satisfy first *Gingles* element) *Skorepa v. City of*

Chula Vista, 723 F. Supp. 1384, 1391 (S.D. Cal. 1989). Indeed, the population numbers here are almost identical to those which were before the *McNeil* court.

The reason for the rejection of a below-50% voting age population threshold is simple: Without the bright line drawn by a majority requirement, it becomes increasingly difficult for courts to determine in any reasonable or uniform fashion whether injury has occurred to the minority group's voting power, *Hastert*, 777 F. Supp. at 653, while flooding the courts with marginal claims of dilution. *McNeil*, 851 F.2d at 947; *Hastert*, 777 F. Supp. at 653-55; *Skorepa*, 723 F. Supp. at 1391. A definition of minority influence district that has no limits as to voter group size "runs counter to the principle that 'no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength.'" *See Hastert*, 777 F. Supp. at 655 & n.33 (*quoting Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980)); *Skorepa*, 723 F. Supp. at 1390 (26.1% of voting age population "far too low to meet the first [*Gingles*] precondition"); *see also Turner v. State of Ark.*, 784 F. Supp. 553, 570 (E.D. Ark. 1991) (statements of *McNeil* concerning need to show majority of voting age population "apply even more aptly to the single-member districts in question here").

Second, the Appellants' claim that the majority requirement in the first *Gingles* threshold element can be set aside for "influence" districts because of an "explicit recognition" of such districts in *Chisom v. Roemer*, ___ U.S. ___, 111 S. Ct. 2354 (1991), Juris. Stmt. at 27, is based on a complete misreading of a single footnote sentence in *Chisom*.

The *Chisom* court considered whether section 2 applied to state judicial elections. In finding that section 2 did apply, the majority opinion specifically *rejected* a construction of section 2(b) which would create a protected right to participate in elections *separate from* the right to elect representatives of the minority group's choice. The *Chisom* majority stated:

> Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome

> of an election. *As the statute is written, however,* the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. *The statute does not create two separate and distinct rights.* Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in the denial or abridgment of "*the right*" to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. §1973 (emphasis [in italics] added [by Supreme Court]). *It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.*

Chisom, ___ U.S. ___, 111 S. Ct. at 2365 (emphasis added). Thus, while recognizing that the ability to "influence" elections can be diminished, the *Chisom* court held that the statute requires *more* than a mere effect on the opportunity to participate which "influence" would provide; a section 2 violation occurs *only* when the opportunity to participate in the process *and* the opportunity to elect candidates of choice are *both* infringed. Indeed, immediately following this quotation, the *Chisom* majority emphasized that section 2 is patterned after this Court's precedent holding that the plaintiff's burden is to produce evidence that the minority group's members had less opportunity to participate in the political process *and* to elect legislators of their choice. *Id.* (*citing White v. Register*, 412 U.S. 755, 766 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)).

Justice Scalia dissented, arguing that small minority groups might not be protected under the majority's construction of section 2 because they will lack numbers sufficient to elect a candidate of their choice. In a footnote located at the end of the above quotation, the majority states that Justice Scalia's argument "rests on the erroneous

assumption that a small group of voters can never influence the outcome of an election." *Chisom*, ___ U.S. ___, 111 S. Ct. at 2365 n.24. Coming as it does at the end of a long discussion of section 2's language (which concludes that section 2 requires a showing of less opportunity to participate *and* denial of the opportunity to elect), this footnote language does not abandon the requirement of showing a denial of the opportunity to elect — a requirement which *Gingles* says is met by showing that the minority group constitutes a majority in the district. Rather, the footnote language simply responds to the dissent's argument that the "right" to participate in the political process will be unprotected, saying that voting (and therefore "influencing" an election) is participating in the election process. *Nothing* in the footnote (or the entire opinion) states that ability to "influence" an election is a separately protected right under section 2. *Nothing* in the footnote (or the entire opinion) states or even implies that ability to "influence" elections must be maximized when drawing election districts. *Nothing*, in short, comes even close to saying that "influence" districts are cognizable under section 2.

Thus, there is no legal basis for Appellants' claim that the Voting Rights Act requires that an "influence" district be created in downstate districts.

2. Appellants Cannot Satisfy The *Gingles* Threshold Elements As To The Downstate Minority Fracturing Claims.

The evidence presented before the three-judge panel proved that, empirically, none of the minority populations in the geographic areas challenged by Appellants could be grouped into a single district in which the group would constitute a majority of the voting age population so as to warrant Voting Rights Act protection. Perhaps the best evidence of this comes from the Appellants themselves. When given the opportunity to draw a map for the challenged downstate areas, the Appellants split up the minority populations in the challenged areas of Aurora, Bloomington-Normal, Champaign-Urbana, Decatur, Elgin, Joliet, Metro-East (East St. Louis), Rock Island, Springfield, and Waukegan in roughly the same percentages as does the Jourdan III-A Plan:

	Jourdan III-A District	Gardner District	Population Difference
AURORA			
	42	42	
African-	6,935	11,148	4,213
American	7.2%	11.5%	4.3%
	84	42	
Hispanic	20,007	24,408	4,401
	20.7%	25.2%	4.5%
CHAMPAIGN			
	42	42	
African-	11,529	12,372	843
American	11.9%	12.8%	.9%
ROCK ISLAND			
	72	71	
African-	7,560	9,008	1,448
American	7.8%	9.3%	1.5%
	71	71	
Hispanic	4,697	6,464	1,767
	4.8%	6.7%	1.9%
SPRINGFIELD			
	100	100	
African-	12,324	12,618	294
American	12.7%	13.0%	.3%

WAUKEGAN

	59	61	
African-American	20,839 21.5%	23,202 24.0%T2.5%	2,363

	59	61	
Hispanic	15,456 16.0%	19,645 20.3%	4,189 4.3%

LEYDEN

	77	77	
Hispanic	12,535 12.9%	15,853 16.4%	3,318 3.5%

Thus, it is empirically not possible to combine these minority populations into geographically compact single districts in which such populations constitute a majority so as to maximize their "influence." The first Gingles threshold element is clearly absent here.

3. The Evidence Failed to Prove Appellants' Theory Of "Influence" In The Downstate Districts.

Even if some theory of "influence" is cognizable under the Voting Rights Act, the Appellants have failed to offer credible evidence of the supposed "influence" they seek to maximize. The three-judge panel specifically found that the Appellants failed to show proof of the "influence" they claimed was being denied minority populations. *March 11 Opinion*, 786 F. Supp. at 716:

> [t]he evidence . . . does not clearly show that a 13.0% minority population in a Springfield district could be significantly more influential than the 12.7% provided for, or that a 12.8% minority would be significantly more powerful than 11.9% in a Champaign-Urbana district.

The Appellants' theory of downstate fracturing is unworkable. Apparently Appellants believe that *any* minority population not in-

cluded in a district constitutes a "fracturing" which violates the Voting Rights Act; Mr. Brace admitted that under his proposed interpretation, a census block of as small as *five* minority persons could give rise to a Voting Rights Act claim if split off from a district containing other minority population. (Tr. at 496-99). That simply ignores the reality of the geographic dispersion of minorities throughout the state. Indeed, taken to its logical conclusion, Brace's theory would require the map-drawer to draw gerrymandered districts containing relatively equal numbers of white Democrats and white Republicans so that small groups of minorities could "swing" an election. As Brace admitted, under his analysis, the Gardner Plan — which was supposed to "remediate" the alleged violations of the Voting Rights Act — itself violates the Voting Rights Act because it splits minority populations downstate in the same rough percentages as Jourdan III-A. (Tr. at 496-99). This self-condemnation underscores the legal bankruptcy of Appellants' claims.

The true motivation for Appellants' downstate fracturing claim becomes transparent when the political ramifications of the Gardner Plan are examined. While the Gardner Plan keeps minority communities split and makes only minor changes in concentration of minorities within the challenged downstate geographic areas (thereby "fracturing" those communities), the Gardner Plan's proposed changes in each of the challenged areas benefits the Democratic Party at the expense of the Republican Party. Mr. Brace admitted that the district line changes in the Gardner Plan would benefit the Democrats in the following way based on Mr. Brace's numbers:

	Repub. v. Dem. Jourdan III-A	Repub. v. Dem. Gardner Plan	% Shift to Dem. in Gardner
Aurora			
House 42	59.4% v. 41.6%	45% v. 55%	14.4
Champaign			
House 104	56.8% v. 43.2%	51.9% v. 48.1%	4.9
Rock Island			
House 71	44.4% v. 56.6%	39.8% v. 60.2%	3.6
Springfield			
House 100	53.2% v. 46.8%	51.1% v. 48.9%	2.1
Waukegan			
House 61	60% v. 40%	39.6% v. 61.4%	21.4

(Tr. at 371, 375-90). Overall, the Gardner Plan would switch five or six House and three Senate seats from Republican to Democrat. (Tr. at 388, 391, 393). In effect, Mr. Brace, who testified in the Commission hearings that Jourdan III-A was politically unfair and supported a Democratic-biased plan (only to have the Commission and the Illinois Supreme Court reject his claim), was seeking to alter the political balance of the map under the guise of helping minorities avoid "fracturing." The three-judge panel correctly rejected this political agenda.

Given the legal and factual insufficiency of Appellants' claims, the three-judge panel correctly rejected the downstate "fracturing" claims.

C. The Three-Judge Panel Correctly Found No Violation Of The Voting Rights Act On The Hispanic "Influence" District On Chicago's Northwest Side

Appellants' third challenge to the three-judge panel's decision is the failure to recognize Appellants' claim that Jourdan III-A vio-

lates the Voting Rights Act in its configuration of House District 33, the so-called Hispanic "influence" district on the northwest side of Chicago. Juris. Stmt. at 27, 33-35. According to Appellants, the district can be reconfigured so that Hispanics are 50% of the total population and 44.3% of voting age population, rather than the 39% total population created in Jourdan III-A.

As an initial matter, it is important to note the chronology of events which preceded the creation of House District 33 in Jourdan III-A. In Jourdan II, an earlier plan approved by the Commission, the Hispanic super-majority House Districts 3 and 4 had 66.5% and 67.1% total populations, respectively, and House District 12 had 46.6% Hispanic total population. Senator Miguel del Valle, whose new district would encompass House Districts 3 and 4, complained that the total populations in House Districts 3 and 4 were too low based upon the affidavits of Dr. Gordon B. Henderson, who opined that Hispanics needed 70% population in order to be able to elect candidates of their choice in House Districts 3 and 4. In response to Senator del Valle's objection, Jourdan III-A increased the Hispanic population to slightly above the 70% that Dr. Henderson claimed was necessary, thereby reducing the population which could be combined into what was to become House District 33. In short, House District 33 became a 39% Hispanic district because of the need to protect the Hispanic super-majority House Districts 3 and 4.

In this case, the Appellants advanced two differing theories on House District 33: (1) that House District 33 (as reconfigured by Appellants' competing reapportionment Plan) was one in which the Hispanics could elect a candidate of their choice, see Tr. at 507 (Brace testimony); at 735, 756-57 (Henderson testimony); and (2) that House District 33 is an "influence" district — i.e., one in which the minority population can "swing" an election. Under either theory, Appellants have not established a Voting Rights Act claim.

1. The Three-Judge Panel Correctly Found That Appellants Failed To Establish That Hispanics In House District 33 Could Elect Candidates Of Their Choice.

The three-judge panel held that Appellants failed to provide sufficient evidence to show that Jourdan III-A's House District 33

denies Hispanics the ability to elect a candidate of their choice. As a preliminary matter, Appellants' own plan could only create a district with a 44.3% Hispanic voting age population, far below the majority which would guarantee an ability to elect candidates of their choice. *See McNeil*, 851 F.2d at 947 (failure to have a voting age population majority precludes a section 2 claim).[8]

Appellants' assumption that a 50% Hispanic population equates with an ability to elect a candidate of Hispanic's choice is belied by historical data. Dr. Engstrom testified that House District 10 of the 1981 plan in the same area was 50% Hispanic yet elected Anglo representatives despite the pronounced tendency of Hispanics to vote for Hispanic candidates. (Tr. at 711, 714-16). Further, Appellants' own expert, Mr. Brace, testified that even under the Gardner Plan, Hispanics would have to "coalesce with the white community or some part of the black . . . or Asian community" in order to be able to elect candidates of their choice (Tr. at 507), and that such political coalitions are possible (*id.*). Dr. Gordon Henderson, appearing on behalf of Hispanic challengers to Jourdan III-A, likewise testified to "coalitional" voting in Senate District 2. (Tr. at 728-30). The admitted fact that Hispanics need to form a coalition contradicts the claim that Hispanics can elect candidates of their choice. The panel was therefore justified in stating in the *March 11 Opinion*: "[t]he record, as well as the general 65% guidelines, suggest that the Hispanic voting age population must be substantially higher than 44.3% to provide such an opportunity [to elect candidates of choice]." 786 F. Supp. at 714.

2. The Three-Judge Panel Properly Rejected Appellants' Claimed Voting Rights Act Violation For An "Influence" District.

The Appellants also claim that House District 33 should have been reconfigured to be an "influence" district, and that the failure of Jourdan III-A to maximize Hispanic influence in House District 33

---

8 Appellants argue that *McNeil* does not apply because it concerned multi-member or at-large districts. This attempt to distinguish *McNeil* fails because the plaintiffs in *McNeil* were arguing *for* single-member districts.

violates the Voting Rights Act. The three-judge panel rejected Appellants' "influence" district claim on legal and factual grounds. *March 11 Opinion*, 786 F. Supp. at 715-16. As explained above, there is no legal basis for an "influence" district claim under the Voting Rights Act. Thus, Appellants' claim on House District 33 is legally deficient. The three-judge panel's decision is justified for two additional reasons: (1) Appellants fail to meet the *Gingles* threshold elements; and (2) the Gardner Plan's House District 33 impairs Hispanic voting power.

(a) Appellants Have Failed to Satisfy the *Gingles* Threshold Elements

As noted above, the Appellants cannot establish that Hispanics in House District 33 can be grouped together to form a majority of the voting age population in a single district. Thus, Appellants cannot satisfy the first *Gingles* threshold requirement. Furthermore, the Appellants did not establish the third *Gingles* threshold element of white bloc or polarized racial voting in House District 33. In fact, Appellants' expert, Mr. Brace, testified that Hispanic voters integrate well with the white community on the northwest side of Chicago (Tr. at 137), and that Hispanics in District 33 would have to *and could* form political coalitions with whites in order to elect candidates of their choice (Tr. at 507). Dr. Henderson's analysis echoed this recognition of the presence and need for "coalitional" voting. (Tr. at 728-30). The claim that minority voters can form coalitions with whites "not only ignores the need to prove under *Gingles* that polarized voting prevents this from happening, *but it directly undercuts their section 2 claim* by showing that even absent a majority they could elect candidates of their choice if they sought alliances and coalitions with other voters in the traditional political manner. *If this is true there is no need for, or legal basis for, a section 2 claim.*" *Turner v. State of Ark.*, 784 F. Supp. at 571 (emphasis supplied). The failure to satisfy the *Gingles* threshold elements justifies the three-judge panel's rejection of Appellants' "influence" district claim.

(b) The Appellants' Gardner Plan House District 33 Impairs Hispanic Voting Power

While the Appellants cannot establish a section 2 claim, their proposed "remedy" — Gardner Plan House District 33 — actually would *impair* Hispanic voting power in other districts more than the supposed increase in "influence" in one district. Gardner Plan House District 33 purported to create a 50.0% total population/44% voting age population Hispanic district. To obtain the Hispanic population necessary to reconfigure House District 33, however, the Appellants reduced the population of Hispanic super-majority House Districts 3 and 4 (Senate District 2):

	JOURDAN III-A		GARDNER	
District	Total Pop./%	VAP %	Total Pop./%	VAP %
03	69,038	42,332	65,945	40,639
	71.3%	67.3%	68.1%	63.1%
04	68,275	41,480	65,887	40,105
	70.5%	64.9%	68.0%	63.1%

The evidence supported the creation of Hispanic districts with 70% total population to ensure Hispanics an opportunity to elect the candidates of their choice. To create their proposed House District 33, Appellants would decrease the population of two districts — House District 3 and 4 — below this critical 70% level. Appellants would thereby jeopardize Hispanic voting strength in House Districts 3 and 4. That is an unacceptable (and unnecessary) trade-off under the Voting Rights Act. The three-judge panel noted this fact: "There is no evidence that the 33rd House District could be given an Hispanic voting age majority while retaining the Hispanic super-majority status in the 3rd and 4th Districts." *March 11 Opinion*, 786 F. Supp. at 714.

Therefore, House District 33 as configured under the Jourdan III-A plan complies with the Voting Rights Act because it protects Hispanic interests in neighboring super-majority districts and because there is no legal justification under section 2 requiring the increase in

population concentration sought by the Appellants. Thus, the three-judge panel was justified in ruling against Appellants on the northwest side Hispanic "influence" district claims.

II. THE THREE-JUDGE PANEL PROPERLY DENIED THE APPELLANTS' CHALLENGES UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS IN UPHOLDING THE JOURDAN III-A PLAN

Racial gerrymandering violates both the Fifteenth Amendment, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and the Equal Protection Clause of the Fourteenth Amendment, *Reynolds v. Sims*, 377 U.S. 533 (1964). A plaintiff must show both discriminatory intent and discriminatory effect as essential elements in order to state a claim for relief under the Equal Protection Clause of the Fourteenth and Fifteenth Amendments. *Davis v. Bandemer*, 478 U.S. at 127 (separate opinion of White, J.); *City of Mobile v. Bolden*, 446 U.S. 55, 62-68 (1980); *Ketchum v. Byrne*, 740 F.2d 1398, 1406 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

While proof of discriminatory intent may be inferred when the circumstances justify the conclusion that invidious discrimination was more likely than not a motivating factor in the redistricting decision, *see Bolden*, 446 U.S. at 70-74, the mere showing of awareness that a decision would affect a minority group is not sufficient: "'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Bolden*, 446 U.S. at 72 n.17 (*quoting Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1970)). Rather, the plaintiff must show that the purpose was "to minimize or cancel out the voting potential of racial or ethnic minorities . . . [and] that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'" *Bolden*, 446 U.S. at 66 (*quoting Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)). Discriminatory effect requires a showing that the affected groups have "less opportunity to participate in the political processes and to elect candidates of their choice," *Bandemer*, 478 U.S. at 131 (separate opinion of

White, J.) (*quoting Rogers v. Lodge*, 458 U.S. 613, 624 (1982)), or that the plan "fences out a racial group so as to deprive them" of their vote, *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). Discriminatory effect is *not* shown by way of speculating as to the proportion of seats the group may garner or by the fact that winning elections might be more difficult under the new redistricting plan. *Bandemer*, 478 U.S. at 130-32 (separate opinion of White, J.); *Bolden*, 446 U.S. at 66.

The three-judge panel found that Appellants have failed to offer any proof of discriminatory intent in the drafting of Jourdan III-A or discriminatory effect in the operation of Jourdan III-A sufficient to establish a claim under the Fourteenth or Fifteenth Amendments. *March 11 Opinion*, 786 F. Supp. at 717. Appellants claim that the three-judge panel did not explain how Appellants failed to meet their burden of proof. Juris. Stmt. at 38. In effect, Appellants believe that they are entitled to review simply because *they* believe they proved intent.

Appellants' claim that they proved discriminatory intent by showing that the Commission was informed (by Appellants) that the Jourdan III-A plan was discriminatory, and the Commission did nothing about it. Juris. Stmt. at 38. The critical premise to this argument is that the plan is in fact discriminatory; the Illinois Supreme Court and the three-judge panel found, however, that the Jourdan III-A plan does not violate minority voting rights under state constitutional and Voting Rights Act principles, respectively. It is difficult to see how the promulgation of a legally sufficient reapportionment plan which protects minority voting rights evidences an intent to discriminate against minority voting rights. The three-judge panel's finding of no discriminatory intent makes eminent sense and needs no further explanation unless and until Appellants can articulate how discriminatory intent is present despite two judicial approvals of Jourdan III-A. No such explanation is attempted in the Jurisdictional Statement, and therefore there is no need for further review by this Court.

III. THE THREE-JUDGE PANEL PROPERLY FOUND THAT THE RESULTS OF THE MARCH 1992 PRIMARY ELECTION DID NOT PROVIDE AN ADEQUATE BASIS FOR A NEW TRIAL

As a final basis for review, Appellants allege that the three-judge panel erred when it failed to order a new trial after the March 17, 1992 Illinois primary election because, Appellants contend, "the results confirmed appellants' claim that African-Americans would not have a fair opportunity to elect candidates of their choice." Juris. Stmt. at 24. How or why the election results "confirm" Appellants' claims is never explained.

Although the Appellants at trial claimed that African-Americans could not elect a candidate of their choice in eight House and three Senate Districts, their Motion for New Trial cited only three House districts (Nos. 23, 24, and 28) and one Senate (No. 12) in which white candidates prevailed over African-American candidates in the March 17 primary. In denying the Motion, the three-judge panel described the Appellants' failure of proof as follows:

> The cited primary results establish, at most, that African-Americans' chosen candidates were not guaranteed election. That is clearly insufficient under both the Voting Rights Act, 42 U.S.C. § 1973(b) — "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population" — and the 14th Amendment equal protection clause. City of Mobile v. Bolden, 446 U.S. 55, 75-77, 100 S.Ct. 1490, 1504-05, 64 L.Ed.2d 47 (1980) (right to equal participation group from electoral defeat). The primary results do not show that African-Americans in the cited districts were denied a meaningful opportunity to elect their chosen candidates.

792 F. Supp. at 1112. The three-judge panel's decision is justified by the facts and law.

First, the results of a single election cannot establish a Voting Rights Act cause of action. "Relying on a single election to prove unconstitutional discrimination is unsatisfactory." *Bandemer*, 478

U.S. at 135 (separate opinion of White, J.); *see Jenkins v. Red Clay Consolidated School Dist. Bd. of Educ.*, 780 F. Supp. 221 (D. Del. 1991) ("Results from one election do not show that white voters usually vote in a way to defeat the black voters' choice of candidates."). Evidence of a "*consistent*" degradation of voting power and proof of "*continued*" frustration of the will of the majority of voters is required to support a claim. *Id.* Thus, the mere fact that some minority candidates lost in a *single* election cannot under federal law establish the requisite showing of a "consistent degradation" or "continued frustration of the will of the voters." More than one election is necessary for such a showing.

Further, the major underlying premise of the Appellants' arguments appears to be that African-American super-majority districts must elect African-American candidates or else the Voting Rights Act is violated. The Voting Rights Act, however, does *not* stand for the proposition that a super-majority district must produce candidates of the same race as the super-majority. Neither the Voting Rights Act not the Equal Protection Clause of the Fourteenth Amendment require proportional representation. *See* Voting Rights Act, 42 U.S.C. § 1973 ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"); *Bolden*, 446 U.S. at 75 (1980) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization"). Thus, Appellants' claims are not supported by the law.

Second, the results from the 1992 primary elections for the Illinois House and Senate do not establish the allegations made by the Appellants. Of the twenty-five Chicago-area African-American super-majority districts (Senate and House) in the redistricting plan approved by the three-judge panel, African-American candidates were victorious outright in the primary in eighteen such districts.[9] In four others (House Districts 24, 25, and 29, and Senate District 12), the cumulative vote totals for minority candidates exceeded the

---

9 In addition, Hispanic candidates were elected in all of the Hispanic super-majority districts under the current plan.

cumulative vote totals for white candidates. Rather than "degradation" of voting power or "frustration of the will of the voters," these results indicate the effectiveness of the plan and belie Appellants' claims.

Indeed, it is difficult to interpret the March 17 primary results as "confirming" much of anything about Appellants' claims in the trial court. The Motion for New Trial cites only four of the eleven African-American super-majority districts challenged at trial, and in two of those four districts the African-American candidates received more votes than the white candidates. That works out to an **18% rate of accuracy** for Appellants' predictions at trial (assuming that African-Americans in the remaining two districts did not elect candidates of their choice -- a fact which Appellants claimed but never offered to prove). The four Chicago districts cited in Appellants' Motion for New Trial offer no proof of a frustration of "influence" of Hispanic voters in House District 33 or the downstate minority populations in Aurora, Champaign, Rock Island, Springfield, Waukegan, or Leyden Township. Quite simply, Appellants' claim of a "confirmation" of its theories at trial is a gross overstatement.

Further, the March 17 primary results undermined a central tenet of Appellants' theory. At trial, Appellants alleged that the challenged Chicago African-American super-majority districts contained "powerful white Democratic ward organizations" that would be able to target and defeat African-American candidates. The example offered was that of the allegedly all-powerful 11th Ward Democratic Organization which Appellants claimed would be able to field white candidates and prevail in the corresponding African-American super-majority Senate and House districts. However, under the approved Jourdan III-A plan, African-American women defeated white Democratic incumbents in districts encompassing significant portions of the 11th Ward Democratic Organization.

In short, neither the law nor the facts required a new trial on the basis of the March 17, 1992 Illinois primary. The three-judge panel was justified in its denial of Appellants' Motion for New Trial, and its *June 11, 1992* opinion should be affirmed.

CONCLUSION

Based on the foregoing arguments, the Appellees respectfully request that this Court dismiss this appeal and/or affirm the March 11 and June 11, 1992 rulings of the three-judge panel below.

Respectfully submitted,

Dan K. Webb
Steven F. Molo*
Timothy J. Rooney
Thomas V. Skinner
SPECIAL STATE COUNSEL
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

Counsel of Record